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The PMT Tribe's Comment Regarding the Proposed Rule for Federal Acknowledgement of American Indian Tribes

The following comments are submitted by the Piro-Manso-Tiwa Indian Tribe, Pueblo of San Juan Guadalupe ("PMT" or "the Tribe").

A. Background

PMT is a vibrant, present-day Native American tribal community. The Tribe traces its roots and ancestry to the Piro, Manso and Tiwa Indians who inhabited the region in and around the Mesilla Valley in the historic area of Las Cruces, New Mexico and El Paso, Texas. The members of PMT and their ancestors have maintained their community, culture and tradition for hundreds of years, overcoming many challenges and hardships with no Indian reservation or secure land base and limited economic and financial resources. PMT has survived in the face of numerous encroachments and depredations by outside forces.

PMT's efforts to achieve federal recognition date back to January 1971 when the Tribe submitted a letter of intent.[1] Thoroughly documented petitions were submitted in 1992 and 1996, and further supplemented by the Tribe's 245-page filing (together with six additional boxes of

[1] The Tribe's "letter of intent" was actually a fully documented request to the Bureau of India Affairs (BIA or Bureau) for federal recognition. Supporting historical documentation was submitted, and legal arguments for recognizing PMT's sovereign status were presented. And PMT's 1971 submission was preceded by communications on the subject of recognition with the Bureau's area office in Albuquerque, New Mexico dating back to the late 1960's.

supporting materials) on May 3, 2010. After active consideration of the Tribe's petition commenced, however, further consideration was suspended on October 17, 2011 "to allow ASIA review." That remains the situation today. As a consequence, after the passage of more than 40 years, PMT has yet to receive even a preliminary finding as to whether its status as a sovereign tribal entity is to be recognized.

B. The Department's Proposed Rule Shows Many Positive Changes to the Part 83 Process.

Like many other commenters, PMT previously suggested and currently welcomes many of the changes incorporated in the Proposed Rule, published on May 29, 2014 in the Federal Register. 79 Fed. Reg. 30,766. The changes communicate the care with which the Secretary of the Department of Interior reviewed the more than 2,800 commenters' input.[2] The Proposed Rule also reflects modernizing the process and responding to changes in the law. *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209 (D.C. Cir. 2013).

The Proposed Rule provides much-needed clarity by setting specific percentages to meet certain requirements. Additionally, setting a timeline on processes for reviewing the petition quickens a pace for the process that at least one court called "glacial." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1097 (D.C.Cir.2003). PMT applauds setting time limits and clarifying other standards.

C. Responses to the Department of Interior's Specific Questions

The Department of Interior requested comments on the proposed hearing process and the following, specific three questions: (1) who is an appropriate Office of Hearing Appeals (OHA) judge to preside over the hearing and issue a recommended decision – an administrative law

[2] Office of the Assistant Secretary – Indian Affairs, "Interior Proposes Reform of Federal Acknowledgement Regulations: Proposed rule would address 'broken' process," at p. 2 (May 22, 2014).

judge appointed under 5 U.S.C. § 3105, an administrative judge with OHA, or an attorney designated by the OHA director to serve as the OHA judge; (2) whether the factual basis for the OHA judge's decision should be limited to the hearing record; and (3) whether the hearing record should include all evidence in Office of Federal Acknowledgment (OFA)'s administrative record for the petition or be limited to testimony and exhibits specifically identified by the petitioner and OFA. PMT starts by commenting on the three questions.

1. **<u>An Administrative Law Judge appointed under 5 U.S.C. § 3105 is an appropriate OHA judge to preside over the hearing and issue a recommended decision.</u>**

PMT sees several reasons that the Final Rule, unlike the Proposed Rule, should allow only an Administrative Law Judge (ALJ) appointed under 5 U.S.C. § 3105 to preside over the hearing and issue a recommended decision.

First, of the three kinds of judges under the current proposal, the ALJ appears to be the most insulated from the Office of Federal Recognition, which, as PMT noted in its comments to the Preliminary Discussion Draft, wears too many hats.[3] While PMT recognizes that OHA is a different division in the Department of Interior and separate from OFA, PMT notes that as the most insulated of the three judges, the ALJ has the appearance of being the most impartial. By contrast, an attorney designated by OHA Director sits on occasion, reporting to the head of his or her individual office.[4] The decision to designate may unintentionally or appear to incentivize the designated attorney to favor upholding OFA decisions. This may result in at least the appearance of impropriety.

[3] See PMT Tribe's Comment Regarding the Preliminary Discussion Draft Proposing Revisions to 25 C.F.R. Part 83, at 8-9.
[4] See Assistant Secretary – Indian Affairs, "Frequently Asked Questions: Proposed Rule: Federal Acknowledgement (25 CFR 83)," (May 22, 2014) at *4.

Second, the ALJ is the most independent. As the Assistant Secretary of Indian Affairs explained on May 22, 2014, an ALJ "is not subject to oversight by a supervisor" and "is fully independent."[5] By contrast, the administrative judge reports to the Director at OHA. *Id.* Unlike the administrative judge, the Administrative Procedures Act (APA) provides several statutory safeguards to ensure an ALJ's independence in presiding over hearings, including issuing subpoenas, administering oaths, and regulating hearings. 5 U.S.C. § 556. As the Supreme Court explained, "[p]rior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment…because they were often subordinate to executive officials within the agency." *Butz v. Economou*, 438 U.S. 478, 513-514 (1978). Thus, PMT supports limiting the hearing officers to ALJs appointed under 5 U.S.C. § 3105 (ALJ).

2. <u>The factual basis for the OHA judge's decision should be limited to the hearing record.</u>

The PMT Tribe supports a Final Rule that limits the factual basis for the OHA judge's decision to the hearing record. Some of the positive aspects for this sort of limitation in the process include:

i. It will allow the OHA judge to exercise exercising traditional fact-finding competencies while focusing on facts presented by the parties;

ii. Many adjudicatory decisions are grounded in facts on the record; and

iii. It is consistent with generally accepted civil adjudicatory practice.

3. <u>The hearing record should be limited to testimony and exhibits specifically identified by the petitioner and OFA.</u>

[5] See Assistant Secretary – Indian Affairs, "Frequently Asked Questions: Proposed Rule: Federal Acknowledgement (25 CFR 83)," (May 22, 2014) at *4.

PMT responds that the Final Rule should limit the hearing record to the testimony and exhibits specifically identified by the petitioner and OFA. The Tribe notes that the advantages of such an approach encompass: (1) allowing for more expeditious hearings, (2) making clear to reviewing judicial courts the scope of the administrative record, (3) clarifying that the burden is on the petitioner to bring the salient facts to the decision makers' attention and respond to facts by opposing commenters, and (4) reducing the burden of review on the agency and the OHA judge.

4. <u>The Hearing Process in the Proposed Rule is generally acceptable.</u>

Consistent with the Tribe's two previous comments regarding limiting the hearing record to testimony and exhibits presented at the hearing and the OHA judge limiting the factual basis for the decision to the hearing record, PMT supports a hearing process that is similar to other hearing processes and has definite timelines for certain actions. The Proposed Rule that incorporates the related Proposed Rule to Hearing and Re-Petition Authorization Processes Concerning Acknowledgement of American Indian Tribes to revise 43 C.F.R. pt 4[6] fits these general guidelines. As a result, PMT finds the Proposed Rule an acceptable means for expeditiously resolving federal acknowledgement disputes in hearings.

PMT notes that the Proposed Rule regarding the hearing process would benefit from defining the interests that permit intervention as of right.

D. <u>General Comments</u>

PMT welcomes many of the positive changes in the Proposed Rule and submits the following additional comments.

1. <u>Process</u>

[6] Published June 19, 2014, (79 Fed. Reg. 35,129).

- There must be a definite timeline for respondents to file comments. Otherwise, respondents could delay comments for a long time.

2. <u>Subpart A</u>

- PMT urges that the Final Rule should change the term "Informed Party" to "Interested Party." *See e.g.* Proposed Rule Section 83.25. The definition of "Interested Party" should require the party to have a direct and material connection/interest to the Petitioner and its Petition. Otherwise, as currently defined in the Proposed Rule, the economic resources for research by "any person or organization" can be brought to bear against a specific petitioner, even when such economic resources are expended by biased parties who have no direct interest in the petitioner's matter. Additionally, the identity of the Interested Parties should be disclosed to the petitioner within 60 days of identification.
- The Tribe recommends changing "whose" to "who" in Section 83.7(a), line 1.

3. <u>Subpart B</u>

- The substantial break factor in Section 83.10(b)(5) should be more flexible.

4. <u>Subpart C</u>

- In Sections 83.22(b)(3) and 83.37(b), the term "potential" should be changed to "direct and material." This change is consistent with limiting the parties that can comment on the petition from "informed parties" to "interested parties."
- Section 83.22(c) should be deleted. The proposed rule requires posting portions of the petition and portions of the proposed findings and reports on the internet. PMT has experienced "Splinter/Rump Groups" using the federal Freedom of Information Act to appropriate PMT's Petition, copying relevant portions, changing the tribal name to theirs, and then claiming the Petition as their own. The internet portion would serve only to

further facilitate this practice. In addition, many petitioner's petitions will contain confidential information, like sacred sites, that the current Section 83.21(b) fails to protect. The Proposed Rule that allows posting this information on the internet will make indigenous peoples' confidential information, including the location of sacred sites and descriptions of traditional native ceremonies and other cultural practices, vulnerable to the public that can then desecrate such sites, traditional native ceremonies, and other cultural practices. This will incentivize petitioners to omit such information from petitions. Petitioners, including PMT, should not have to choose between exposing sacred sites, traditional native ceremonies, and other cultural practices to possible destruction and omitting information that would help them meet the federal acknowledgement criteria. As a result, Interior should delete from the Final Rule any requirement that petitions and proposed findings, or portions of petitions and proposed findings, be posted on the internet.

- The Final Rule should clarify that suspended petitions maintain first place in the queue ahead of newly filed petitions under the new regulations.
- In Section 83.35(a), 90 days should be reduced to 60 days.
- Also in Section 83.35(a), the term "interested party" replaces "individual or organization."
- The Tribe urges adding "interested" before "parties" in Section 83.35(b).
- In Section 83.37(a), PMT recommends that the time period for making comments to a positive proposed finding should be changed from "timely" to "30 days." This recommendation conforms to the other changes made to the process in changing timelines from undefined to definite.

E. Conclusion.

We would welcome the chance to answer any questions the Department may have regarding the foregoing points. PMT appreciates participating in the rule-making process.

Respectfully submitted this 29th day of July, 2014.

_/s/_____
Edward R. Roybal, II
Governor,
Piro-Manso-Tiwa Indian Tribe,
Pueblo of San Juan Guadalupe